IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 193 OF 2007

Global Aviation Services Pvt. Ltd. ... Petitioners.

V/s.

Malaysian Airline System Berhad and Anr. ... Respondents.

Mr. Gautam Mehta alongwith Amit Vyas & Vishwanathan Iyer, M. Fernandes i/by M/s. Rajani & Associates for the petitioners.

Mr. Haresh Jagtiani alongwith Anil D'souza, Mr. Hamed Kadiali, Ms. Vandana Mehta, Ms. Fatema Ghaliali, Mr. Siddhesh Bhole i/by Mr. Anil D'Souza for respondent No.1.

CORAM : ANOOP V. MOHTA,J.

DATED : 12th June, 2007

ORAL JUDGMENT:-

Heard forthwith by consent.

2. The petitioners have filed the present arbitration petition under Section 9 of the Arbitration and Conciliation Act-1996 (for short,"The Arbitration

Act"). The basic prayers are:-

(a) that pending the hearing and final disposal of the Arbitration proceedings, and till such as the Award which may be passed therein becomes executable, Respondent No.(2) be restrained by an order and injunction of this Hon'ble Court from taking any steps pursuant to the aforesaid letters dated 3rd May 2007 (Exhibit-G hereto) and 5th May, 2007 and the said bank guarantees dated 6th November, 2004 and 2nd July, 2001, invoking the aforesaid Bank Guarantee or receiving any moneys in respect thereof from Respondent No.1;

(b) that pending the hearing and final disposal of the Arbitration proceedings and till such as the Award which may be passed therein becomes executable, Respondent No.2 be restrained by an order and injunction of this Hon'ble Bank Guarantee No. 678/2002 dated 21st March, 2003 and extended from time to time pursuant to the aforesaid letter dated 3rd May, 2007 and bank guarantee Nos. 60102/433 and 276/2001 being Exhibit- A-1 and A-2 respectively.

(c) for interim and ad-interim reliefs terms of prayer clauses (a) and (b) above;

3. Admittedly, there is an arbitration agreement between the petitioners and respondent No.1. There is nothing on record to show that the petitioners have invoked the arbitration clauses to constitute or refer the dispute to the Arbitral tribunal. Therefore, the present petition for ad-interim urgent

reliefs as contemplated under Section 9 of the Arbitration Act.

4. The relevant clauses of the arbitration agreement are clause 12, 22 and clause 27.

"12. **INSTRUCTIONS AND STANDARDS:-**

. The GENERAL SALES AGENT shall at all times observe and comply with all directions and instructions given to it by MAS whether such directions and instructions to come from either the MAS office in the same territory of the GENERAL SALES AGENT, the MAS regional office or from the Head Office of MAS in Kuala Lumpur, Malaysia concerning the services to be provided under the terms hereof and shall ensure that all its staff concerned shall be at all times familiar with all such directions and instructions as amended from time to time. In the absence of specific instructions concerning a particular aspect of the services to be provided the GENERAL SALES AGENT shall consult MAS for further direction(s).

22. **TAXATION, FOREIGN EXCHANGE CONTROLS AND REGULATORY REQUIREMENTS:-**

. The GENERAL SALES AGENT shall constantly advise MAS on matters pertaining to local taxation practices, foreign exchange controls and all other applicable regulatory requirements. Upon instruction from MAS, the GENERAL SALES AGENT shall prepare, submit and carry other all necessary filings, reports and actions on behalf of MAS to the tax, foreign exchange and other regulatory authorities in accordance

with the local law.

27. **ARBITRATION:-**

. In the event of dispute with regards to the interpretation, implementation or execution of any of the provisions herein contained, such dispute shall be referred to IATA's Arbitral Tribunal for resolution by either party and the determination of the arbitrator(s)) shall be final and conclusive."

5. The Arbitration clause itself provides that in the event of dispute with regard to the interpretation implementation or execution of any of the provisions, hearincontained, such dispute shall be referred to IATA's Arbitral Tribunal for resolution by either party and the determination of the arbitrator(s) shall be final and conclusive.

6. The whole submission of the learned counsel appearing for the petitioner is revolved around three bank guarantees totalling amount of Rs.1,70,00,000/- (Rupees one crore seventy lacs only).

7. The basic grounds to challenge the action of invocation of bank guarantees are; that respondent No.1 at the relevant time as contemplated under the agreement, never instructed to collect the service tax under the provisions of Service Tax Act; there

was no such tax liability or obligation on the petitioners; the invocation of the bank guarantees, based on the so- called petitioners' liability, therefore, is not based on the terms and conditions of the agreement in question. The liabilities of the service tax to the tune of Rs.2,70,00,000/-is in excess; there will be irretrievable injury and injustice caused to the petitioners, if these bank guarantees are allow to invoke.

8. The learned counsel appearing for respondent No.1, has resisted all the above contentions.

9. The law in respect of invocation of bank guarantee is concerned, is settled. The cumulative points are as under, based on the judgment cited by both the parties.

. "It was pointed out in that case that a bank guarantee must be honoured in accordance with its terms as the bank, which gives the guarantee, is not concerned with the relations between the supplier and the customer. neither is the bank concerned with the question whether any of them have failed in their contractual obligations or not. In other words, the bank must pay according to the tenor of its guarantee, on demand, without proof

or condition."

. "There are, however, two exceptions to this rule. The first is when there is a clear fraud of which the bank has notice and a fraud of the beneficiary from which it seeks to benefit. The fraud must be of an egregious nature as to vitiate the entire underlying transaction. The second exception to the general rule of non-intervention is when there are "special equities" in favour of injunction, such as when "irretrievable injury" or "irretrievable injustice" would occur if such an injunction were not granted."

. **(2006) 2 SCC 728 in BSES LTD. (NOW RELIANCE ENERGY LTD). Vs. Fenner India Ltd. & anr.**

. "Suffice it to say that in the case of confirmed bank guarantees irrevocable letters of credit, the Court will not interfere with the same unless there is fraud and irretrievable damages are involved in the case and fraud has to be an established fraud."

. **(1995) 6 SCC 76, Hindustan Steel Workers Construction Ltd. Vs. G.S. Atwal & Co. (Engineers) Pvt. Ltd.**

. "In this case fraud has not been pleaded and the relief for injunction was sought by the contractor/ Respondent 1 on the ground that special equities or the special circumstances of the case required it."

. "28. ...In order to restrain the operation either or irrevocable letter of credit or of confirmed letter of credit or of bank

guarantee, there should be serious dispute and there should be good prima facie case of fraud and special equities in the form of preventing irretrievable injustice between the parties"

. **(1996) 5 SCC 34 Hindustan Steelworks Construction Ltd. Vs. Tarapore & Co. & Anr.**

10. There is no case made out by the petitioners' for any reliefs as claimed, in view of the above points, on facts and also even on law.

11. The submission raised by the learned counsel appearing for the petitioners as referred above, is about the interpretation of the agreement in question. The interpretation or any dispute out of this agreement, as agreed need to be referred to the arbitral tribunal. Unless the submission as raised and or accepted the contentions parties and or the tribunal after due deliberation, it is not possible for this Court, at this stage, to accept the submission raised by the learned counsel for the petitioners.

12. This is not the prima facie or apparent case, even after reading the pleadings as well as documents

placed on record, of any "fraud" or "special equity " or "exceptional circumstances". Mere allegations are not sufficient to grant reliefs as prayed in the present petition.

13. Normally the allegations of fraud and/or collusion and/or such factors always need to be proved by the parties, who wants to harp on it. Section 9 Petition like this is not the forum, where the said issues can be decided, specially when other parties disputing all such allegations. Therefore, prima facie I am of the view that where there are allegations against any party of fraud and/or or collusions, unless there is a material to substantiate the same and which need no further evidence and/or which is apparent on the face of record the court only in such cases may pass appropriate order in the interest of Justice after giving opportunities to the concerned parties, and not otherwise.

14. The learned counsel appearing for respondent No.1 is right in making submission that there is no material on record to substantiate such allegations and or case by the petitioners except bare averments

of "irretrievable injustice"/"injury" and/or of "fraud".

15. However, I am not inclined to accept the submission of the learned Senior Counsel for respondent No.1 that present petition is not maintainable, as respondent No.2 bank is not party to the arbitration agreement. Admittedly, prayer clause (a) is against respondent No.1 who is party to the arbitration agreement. In such cases, there is no bar under Section 9 of the Arbitration Act that court cannot pass any order, if case is made out by the petitioners. Respondent No.2 being a bank, is not a party in the Arbitration Agreement between the parties but joined as a respondent as the relief would have also affects the bank, respondent No.2, as the petitioners wants to halt the bank guarantees in questions. However, as observed above, even without going further into this controversy, as the learned counsel appearing for respondent No.1 rightly submitted that no relief under Section 9 can be granted in the facts and circumstances, even against the party who is the party to the Arbitration agreement. Therefore, this issue needs no further discussion.

16. Even on merits, the basic clause of agreement i.e. Clause no.22 as reproduced above, is the bone of contention for adjudicating the issue as raised in the present petition. As observed above, as per the arbitration clause itself, the question of interpretation needs to be adjudicated by the arbitral tribunal. There may be various questions of facts as respondent no.1 is not accepting or conceding to the facts as submitted by the learned counsel appearing for the petitioners. The issues cannot be decided at this stage, even on the material available. Prima facie as per this clause, it is the General Sales Agent (GSA) petitioners should have advised on matters pertaining to the local taxation practices, foreign Exchange Controls and all other applicable regulatory requirements including the service tax liability under the Indian law. There were no instructions and therefore, the petitioners unable to collect though so-called taxes and liabilities, therefore, cannot be accepted as a ground to interfere with the commercial contract and or documents executed by respondent No.1, being the beneficiary like Bank guarantees in question with respondent No.2 Bank. The interpretation as putforth

by the petitioners of these clauses, as not accepted by the contesting respondent No.1, cannot be said to be the grounds of special equities or special circumstances. The petitioners cannot claim premium to their own defaults. The action of invoking the Bank guarantees therefore, cannot be said contrary to the agreement and the law.

17. The excess payment even if made is always subject to adjustment between the parties if case is made out. Assuming for a moment that respondent No.1 and or such others are negotiating, the matter with the Government, in reference of the service tax liability in question, yet at this stage, unless it is decided finally, in either way, the liability and the responsibility of collecting the service taxes at the relevant time by the petitioners, just cannot be overlooked. At the end of the day, if respondent No.1 or such other persons able to convince to the Government to exempt from such liability, then respondent No. 1 would not be entitled to retain the said amount. The petitioners, in such circumstances, would definitely entitled to claim refund of such amounts. However, at this stage of the proceedings and specially under Section 9 of the Arbitration Act,

I am not inclined to grant the relief as prayed by the petitioners against respondent No.1 and 2.

18. In the result, interim orders passed on 7th May 2007 and 11th May 2007, also stand vacated. Keeping all points open, the petition is dismissed. No costs.

19. The learned counsel appearing for the petitioners has orally applied for stay of effect and operation of this Judgment. Considering the above reasoning, I am not inclined to continue the interim orders and or stay as granted in the matter. The request of stay is, therefore, rejected.

[ANOOP V. MOHTA, J.]